TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 143

ROBERT FORSYTH, PLAINTIFF IN ERROR,

vs.

ROBERT K. WOODS, ASSIGNEE OF THE ESTATE OF EDWARD P. TESSON AND EDWARD M. TESSON, COMPOSING THE FIRM OF TESSON, SON & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED DECEMBER 11, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 347.

ROBERT FORSYTH, PLAINTIFF IN ERROR,

vs.

ROBERT K. WOODS, ASSIGNEE OF THE ESTATE OF EDWARD P. TESSON AND EDWARD M. TESSON, COMPOSING THE FIRM OF TESSON, SON & CO.

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TRANSCRIPT FROM UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the October term thereof, A. D. 1869.

ROBERT K. WOODS, ASSIGNEE, &C., DEF'T IN ERROR,
ag'st
ROBERT FORSYTH, PL'FF IN ERROR.

Be it remembered that heretofore, to wit, on the fourth day of October, A. D. 1869, there was filed in the office of the clerk of the circuit court of the United States for the districts of Missouri the following transcript from the district court of the United States for the eastern district of Missouri, on a writ of error in said case, to wit:

Declaration filed.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

Be it remembered that on the 23d day of December, in the year of our Lord eighteen hundred and sixty-eight, there was filed in the clerk's office of the district court of the United States, in and for the eastern district of Missouri, by Samuel S. Boyd, attorney, a declaration in case of Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson,
2 Son & Co., against Robert Forsyth; which declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States for the eastern district of Missouri, February 7, 1869.

Robert K. Woods, assignee of the estate and effects of Edward P. Tesson, Edward M. Tesson, citizens of the State of Missouri, composing the firm of Tesson, Son & Co., bankrupts according to the statute in force concerning bankrupts, complains of Robert Forsyth, a citizen of the State of Missouri, of a plea of trespass on the case on promises:

For that whereas the said defendant, on the 23d day of December, A. D. 1867, at Saint Louis, to wit, said district, being indebted to the said *bankrupt* in the sum of five thousand six hundred and eighty-five dollars and seventy-six cents, ($5,685 76,) according to the account annexed, and to balance the same, in consideration thereof then and there promised the said bankrupts to pay them the same on demand. Also for that the said defendant, on the 2nd day of March, A. D. 1863, at Saint Louis aforesaid, by his promissory note of that date by him subscribed, promised one Edward P. Tesson to pay him or his order three hundred ($300) dollars in gold, one year after date thereof, for
3 value received, negotiable and payable, without defalcation or discount, at the banking-house of Tesson & Danjen, with interest at the rate of ten per cent. per annum, payable semi-annually, which said one year has long since elapsed, and the said defendant thereafterwards,

to wit, on the 8th day of April, A. D. 1863, paid to the said Edward P. Tesson the sum of one hundred and forty ($140) dollars, in coin, in part payment of the said note, and the said Edward P. Tesson thereafterwards, on the same day, indorsed the said note, thereby appointed the residue of the sum of money specified in said note, then and still unpaid, to be paid to the said bankrupts, whereof the said defendant thereafterwards, on the same day, had notice and thereby became liable, and in consideration thereof then and there promised the said bankrupts to pay them the residue of the said sum according to the tenor of the said note and the effect of the said indorsement so made thereon as aforesaid, yet, though often requested thereto, the said defendant hath never paid the said sums, or either of them, to the said bankrupts, before their bankruptcy, nor since the same to the plaintiff, their assignee, but hath refused, and still utterly refuses, to pay the same or any part thereof.

Wherefore the plaintiff saith that, as assignee aforesaid, he is injured, and has, as such assignee, sustained damage to the amount of ten
4 thousand ($10,000) dollars, and therefore he brings this his suit.

(Signed) SAM'L S. BOYD,
Pl'ffs Att'y.

Robert Forsyth to Robert K. Woods, assignee in bankruptcy of Edw'd P. & Edw'd M. Tesson.

DR.

1867.			
July 13.	To balance L. acc't, rend'd by Tesson, Son & Co., this day	4,842	25
Aug. 1.	To check	451	80
" 24.	" "	25	
Sept. 2.	" "	147	
" 6.	" "	26	
" 7.	" "	183	20
Oct. 15.	" "	26	
" 24.	" "	32	50
Dec. 23.	" "	400	

CR.

Sept. 12.	By deposite		37 99
Nov. 27.	" "		210
" 30.	" "		200
	" balance		5,685 76
		6,133 75	6,133 75
1868.			
Dec. 23.	To balance bro't down	5,686 76	

5 And thereupon, on said 23d day of December, A. D. 1868, there was issued out of the clerk's office of this district court a summons in the usual form, according to the rules and practice of said court; which [which] summons is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern Missouri District, set:

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Robert Forsyth, a citizen of the State of Missouri, that he be and appear before the honorable district court of the United States for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis in and for said district, on the third Monday of February next, then and there to answer unto Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edwad M. Tesson, composing the firm of Tesson, Son & Co., citizen of the State of Missouri, in a plea of trespass on the case on promises to the damage of said plaintiff of ($10,000 00) ten thousand dollars. Hereof fail not, and have you then and there this writ.

Witness the Honorable Samuel Treat, judge of the district court of the United States, in and for said eastern district, the twenty-
6 third day of December, A. D. eighteen hundred and sixty-eight.

Issued at office, in the city of St. Louis, under the seal of said district court, the day and year last aforesaid.

[L. S.] (Signed) BEN. F. HICKMAN,
Clerk of said Court.

And on the third Monday, the 15th day of February, A. D. 1869, the marshal of said United States in and for said district returned into court the summons heretofore issued in this case, together with his return of his proceedings thereon, and said summons with said return were thereupon filed in the clerk's office of said district court on said last-named day, and the return of said marshal upon said warrant is in the words and figures following, to wit:

Marshal's return.

I return this writ not executed, for the reason that the within-named Forsyth could not be found in the E. dist. of Mo.

(Signed) J. B. ROGERS,
U. S. Marshal E. Dist. of Mo.,
By Z. E. THOMAS, *Deputy.*

And at regular stated term of this district court, begun and holden at the city of St. Louis, in said district, on the third Monday, the 17th day of the month of May, A. D. 1869, the following proceedings took place in this case on Thursday, the 4th day of June, in said last-mentioned year, to wit:

Plea filed.

IN CASE NO. 1605 OF ROBERT K. WOODS, assignee, &c., plaintiff, *ag'st* ROBERT FORSYTH, DEFENDANT. } No. 1605.—Plea filed.

7 This day came the defendant by Thomas P. Gant, his attorney, and filed his plea to the action of plaintiff herein, against him.

And the said plea, filed by said defendant on said last-mentioned day, is in the words and figures following, to wit:

Plea.

In the United States district court for the eastern district of Missouri.

ROBERT FORSYTH, DEFENDANT,
ats.
ROB'T K. WOODS, ASSIGNEE OF E. P. TESSON & Co., plaintiff.

And the said Robert Forsyth, defendant, comes and defends the wrong & injury, when, &c., and says that the plaintiff his action thereof aforesaid against him to have and maintain ought not, because he says that on the 27th July, 1865, the firm of E. P. Tesson & Co. was composed of Edward P. Tesson and Edward M. Tesson, and of no others, and continued so composed down to the 23d December, 1867, when said firm became bankrupt; that on the said 27th July, 1865, the said Edward P. Tesson applied for letters of administration with the will annexed on the estate of Peter A. Sarpy, late of said county, deceased, to be granted to him by the probate court of St. Louis County. And the said probate court required of him, the said Edward P. Tesson, to give bond with two sureties in the penal sum of one hundred thousand dollars, conditioned for the faithful performance by him, the said Ed-
8 ward P. Tesson, of his duties as administrator with the will annexed of the said Peter A. Sarpy. And the said Edward P. Tesson and the said Edward M. Tesson did then & there, to wit, at St. Louis aforesaid, on the 27th July, 1865, request the said defendant to become one of such sureties of the said Edward P. Tesson, and did assure him, the said defendant, that all the money and assets which were of the said Peter A. Sarpy would pass into the possession, custody, care, and control of the said E. P. Tesson & Co., and that although nominally the said Edward P. Tesson was the only person named as principal in the said bond, yet in fact it was the purpose and design of the said E. P. Tesson & Co. to make the business of the said administration a matter of partnership business, & to make the said partnership share in the profit and losses thence arising, so that in effect he, the said Robert Forsyth, by signing the said bond, would become the surety of the said firm of E. P. Tesson & Co., and not merely of the said Edward P. Tesson. And the said Robert Forsyth moved by the said joint request of the said Edward P. Tesson and Edward M. Tesson, and relying upon the said assurances and representations of the said Edward P. Tesson and Edward M. Tesson, did become surety of Edward P. Tesson in said bond, a copy of which is herewith produced and to the court shown, said bond being dated 27 July, 1865; and the St. Louis probate court imme-
9 diately thereupon issued to the said Edward P. Tesson letters of administration upon the estate of the said Peter A. Sarpy, and the said Edward M. Tesson and Edward P. Tesson did immediately thereupon take possession of all the goods and chattels, money, credits, and effects that were of the said Peter A. Sarpy, and had and held them in the possession of them, the said E. P. Tesson & Co., in all respects and particulars as the said Edward P. Tesson and Edward M. Tesson as aforesaid assured the said Robert Forsyth that it was their purpose to do. And the said firm of E. P. Tesson & Co., composed as aforesaid, did keep the assets and money, credits and effects, which were of the said

Peter A. Sarpy; and on the 23d day of December, 1867, when the said firm of E. P. Tesson & Co. became & was bankrupt, there was in the hands of the said firm, belonging to the estate of the said Peter A. Sarpy, the sum of thirteen thousand one hundred and sixty-one $\frac{31}{100}$ dollars, for the safe-keeping of which by the said firm, and for the true payment thereof, according to the orders of the St. Louis probate court, the defendant had become bound *and* aforesaid.

And on the sixth day of May, 1868, the said Edward P. Tesson was ordered by the St. Louis probate court to pay the said sum of money to the legal representatives and next of kin of the said Peter A. Sarpy, and neither the said Edward P. Tesson, nor the said Edward P. Tesson & Co., could or would pay the same; whereupon the said defendant,
10 in compliance with his contract in that behalf, did on the said sixth day of May, in the year 1868, pay to the said distributees and next of kin of the said Peter A. Sarpy, the sum of six thousand five hundred & eighty $\frac{65}{100}$ dollars, being the one-half of the said defalcation of the said E. P. Tesson & Co.

And on the twenty-second day of March, 1866, the said firm of E. P. Tesson & Co., being composed of Edward P. Tesson and Edw'd M. Tesson, and so continuing down to the 23d December, 1867, the probate court of St. Louis County was minded to appoint the said Edward M. Tesson curator of one Damaso Gazzi, a person of unsound mind, and did require of him, the said Edward M. Tesson, as a condition of such appointment, that he should execute a bond with two sureties in the penal sum of fifteen thousand dollars, conditioned for the faithful performance of him, the said Edward M. Tesson, of his duties as such curator; and the said Edward P. Tesson and the said Edward M. Tesson then & there requested the said defendant to become bound as the surety of the said Edward M. Tesson, curator of Damaso Gazzi, as aforesaid, and did assure him, the said defendant, that it was the purpose and intention of the said E. P. Tesson and Edward M. Tesson to take the money and effects of the said Damaso Gazzi into their keeping, custody, & charge, and that the said Edward P. Tesson & Edward M. Tesson jointly would become the curators of the estate and
11 effects of the said Gazzi, although only the said Edward M. Tesson was named in the said bond and in the letters of appointment as such curator, and that he, the said defendant, was, by signing said bond in truth the surety for said E. P. Tesson as well as of the said Edward M. Tesson, and was and became the surety of them jointly for the safe-keeping and faithful administration by them of the money, credits, and effects of the said Gazzi; and thereupon, and upon the said assurance and representation, the said defendant did sign the said bond so given by the said Edward M. Tesson, curator of the said Gazzi, and the defendant shows to the court herewith a certified copy thereof, the original not being in his possession, but detained in the St. Louis probate court; and thereupon the St. Louis probate court granted letters to the said Edward M. Tesson, appointing him curator of the estate of the said Damaso Gazzi; and thereupon the said E. P. Tesson & Co. did immediately take charge of, and take into their possession, custody, and keeping, the money, credits, and effects of the said Damaso Gazzi, and preserved the same until the 23d December, 1867, when said firm of E. P. Tesson & Co. became bankrupt, and there was then in the hands of the said E. P. Tesson & Co. the sum of thirty-eight hundred and sixty-nine $\frac{08}{100}$ dollars belonging to the said Damaso Gazzi; and the said Gazzi, on the day of 1868, departed this life,
12 and the administrator of the said Gazzi, duly appointed and qual-

ified, did on the first day of June, 1868, demand of the said Edward M. Tesson the said balance of three thousand eight hundred and sixty-nine $\frac{68}{100}$ dollars, which the said Edward M. Tesson was unable to pay and did not pay; and thereupon the said administrator of the said Gazzi demanded the said sum of money of the said defendant; and on the sixteenth day of June, 1868, the said defendant paid to the administrator of said Gazzi the full and just sum of three thousand eight hundred and sixty-nine $\frac{68}{100}$ dollars, to the payment of which he was bound as surety as aforesaid.

And defendant says that the liability by which he became liable as aforesaid to pay the said sums of money was incurred by him in each case upon the joint request of the said Edward P. Tesson and Edward M. Tesson, and for their joint use and benefit; and the defendant says that the said sums of money so by him paid as aforesaid amount to the sum of ten thousand four hundred and forty-nine $\frac{73}{100}$ dollars, and the amount thereof greatly exceeds the sum of money by him owing to the said firm of E. P. Tesson & Co., as in said plaintiff's declaration stated & set forth, and out of the sum of money so by defendant paid, to wit, the sum of ten thousand four hundred and forty-nine $\frac{73}{100}$ dollars, for the use of the said Edward P. Tesson and Edward M. Tesson,
13 and at their request, the defendant is ready and offers to allow the sum in the plaintiff's declaration mentioned, and for the balance he craves judgment against the said plaintiff, as assignee of the said E. P. Tesson & Co.

(Signed) THOS. T. GANTT, *P. D.*

And at the said last-mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case on Tuesday, the eighth day of the month of June, A. D. 1869, to wit:

Demurrer filed.

IN CASE NO. 1605 OF ROBERT K. WOODS, assignee, &c., plaintiff, *ag'st* ROBERT FORSYTH, DEFENDANT. } No. 1606.

This day came the plaintiff by Samuel S. Boyd, esquire, his attorney, and filed his demurrer to the plea heretofore filed by the defendant in this case.

And the said demurrer, filed by said plaintiff on said last-mentioned day, is in the words and figures following, to wit:

Demurrer.

ROBERT K. WOODS, ASSIGNEE, &C., *v.* ROB'T FORSYTH. } 1605.

U. S. district court, east. dist. of Mo.

And the said plaintiff, as to the said plea of the defendant by him above pleaded, saith that the same and the matters therein contained, the manner and form as the same are above pleaded and set forth,

are not sufficient in law to bar or preclude him, the said plaintiff,
14 from having or maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same, and this he is ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to him.

(Signed) SAM'L S. BOYD,
Pl'ff's Att'y.

And at the said last-mentioned regular stated term of said district court, begun and held as aforesaid, the following further proceedings took place in this case on Tuesday, the 22d day of the month of June, A. D. 1869, to wit:

Demurrer to plea sustained.

IN CASE NO. 1605 OF ROBERT K. WOODS, assignee of the estate and effects of Edward P. Tesson & Edward M. Tesson, bankrupts, plaintiff,
ag'st
ROBERT FORSYTH, DEFENDANT. } No. 1605.

This day came the plaintiff by Samuel S. Boyd, esquire, his attorney, and also the defendant by Thomas T. Gantt, esquire, his attorney, and the court having examined the questions of law arising upon the demurer heretofore filed by said plaintiff to the plea of the defendant filed in this case, and being fully advised of and concerning the
15 same, is of opinion that the law is for the plaintiff on such demurrer, and in accordance with such opinion, now orders that the said demurrer be, and the same is hereby, sustained, and said plea of defendant is deemed and adjudged insufficient to bar the action of plaintiff herein against him.

Default.

And the said defendant, by attorney not asking further to plead to the said action of plaintiff herein, and abiding the decision of the court as rendered upon the said demurrer, makes default; and, on motion of said attorney for plaintiff, the court orders that the default of said defendant be entered of record; which is here now accordingly done.

And thereupon the court finds that the said plaintiff is entitled to a judgment for the sum of five thousand six hundred and eighty-five dollars and seventy-six cents, with interest thereon from this day.

Judgment.

It is therefore now considered by the court that the plaintiff, Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson, Son & Company, bankrupts, recover against the defendant, Robert Forsyth, the sum of ($5,685 76) five thousand six hundred and eighty-five dollars and seventy-six cents, the damages found to be due and assessed by the

court, with interest thereon from this day, and also the costs of
16 this suit, to be taxed, and that execution for the said amount and costs be issued in said case.

And at said last-mentioned stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case on Monday, the twenty-eighth day of the month of June, to wit:

Agreement filed.

IN CASE NO. 1605 OF ROB'T K. WOODS, assignee, &c., plaintiff, *ag'st* ROBERT FORSYTH, DEFENDANT. } No. 1605.

This came the parties by their respective attorneys, and filed an agreement in writing, signed by said attorneys, as to the disposition of said case; and the said agreement, filed by said parties on said last-mentioned day, is in the words and figures following, to wit:

Agreement.

In the United States district court for Missouri, east. dist.

ROBERT K. WOODS, ASSIGNEE OF E. P. TESSON & Co., *vs.* ROBERT FORSYTH.

In this cause the defendant, Forsyth, elects to stand by his plea, and final judgment will, therefore, be given on the demurrer thereto; and the said Robert Forsyth takes a writ of error to the United States circuit court for Missouri, and by consent of parties all proceedings to enforce the payment of the money adjudged are stayed until the determination of said writ of error, without bond or regular order of supersedeas.

17 (Signed) SAM'L S. BOYD, *Att'y for Pl'ff.*
" THO'S T. GANTT, *P. D.*

End of record.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Benjamin F. Hickman, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writings hereto annexed to be a true copy of the original record and proceedings, in case No. 1605, A. D. 1869, of Robert K. Woods, assignee of the estate & effects of Edward P. Tesson & Edward M. Tesson, composing the firm of Tesson, Son & Co., against Robert Forsyth, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court at office in the city of St. Louis, in said district, this twenty-third day of September, in the year of our Lord eighteen hundred and sixty-nine.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

18 And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and holden at the city of St Louis, on the first Monday, the fourth day of October, A. D. 1869, the following proceedings were had in this case on the 9th day of November in said year, to wit:

Hearing of case.

ROBERT K. WOODS, ASSIGNEE, &C., defendant in error, *ags't* ROBERT FORSYTH, PLAINTIFF IN ERROR.	Writ of error from U. S. dist. court for east. dist. of Mo.

This day came the parties by attorneys, and this case having been brought on for hearing at the present term of this court, and the same having been fully heard, argued, and submitted to the court for a decree upon the record and proceedings in the district court of the United States in and for the eastern district of Missouri, and upon the case as presented to this court:

Judgment of district court affirmed.

And the court, after examination of said record and proceedings, and being fully advised in the premises, doth now finally order, adjudge, and decree that the judgment, as rendered in this case by said district court, be, and the same is hereby, now affirmed.

And it is further ordered, adjudged, and decreed that the said defendant in error, Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson, Son & Co., recover against the said plaintiff in error,
19 Robert Forsyth, the costs in this behalf expended, and that execution or a fee bill be issued therefor.

And it is further ordered that a certified copy of this judgment or decree be transmitted to said district court for its further action thereon, in accordance herewith, in enforcing said judgment.

MEMORANDUM.—His Honor Judge Treat did not sit or take part in the disposition of this case.

And afterwards, during the said stated term of the circuit court of the United States, begun and holden as aforesaid, the following further proceedings were had in this case on the 15th day of November, in said year, to wit:

Order allowing supersedeas.

ROBERT K. WOODS, ASSIGNEE, &C., def't in error, *ags't* ROBERT FORSYTH, PL'FF IN ERROR.

Ordered by the Honorable Samuel Treat, one of the judges of this court, that a supersedeas be granted staying all further proceedings upon the judgment rendered in this case, a writ of error having been allowed by him to the Supreme Court of the United States, and bond with surety executed and approved as required by law.

Which bond referred to is in words and figures following, to wit:

Bond.

Know all men by these presents that we, Robert Forsyth, as
20 principal, and Thomas Skinker, as surety, are held and firmly bound unto Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson, Son & Co., in the full and just sum of eleven thousand dollars, to be paid to the said Robert K. Woods, assignee as aforesaid, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, at the October term, A. D. 1869, of the circuit court of the United States for the districts of Missouri, in a suit depending in said court, between Robert K. Woods, assignee, &c., and Robert Forsyth, judgment was rendered against the said Robert Forsyth; and the said Robert Forsyth having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Robert K. Woods, assignee, &c., citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Robert Forsyth shall prosecute said writ to effect, and answer all
21 damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

ROBERT FORSYTH. [SEAL.]
THOMAS SKINKER. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT.

22 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writings hereto annexed to be a transcript of the record in case of Robert K. Woods, assignee, &c., against Robert Forsyth, as fully as the same remains on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said districts, this twenty-second day of November, in the year of our Lord eighteen hundred and sixty-nine.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

23 (Indorsed:) No. , A. D. 1869. United States circuit court, districts of Missouri. Robert K. Woods, assignee, &c., against Robert Forsyth. Duly certified copy of the record in the above-entitled cause.

24 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the October term, A. D. 1869, thereof, between Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson, Son & Co., and Robert Forsyth, a manifest error hath happened to the great damage of the said Robert Forsyth, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this fifteenth of November, in the year of our Lord one thousand eight hundred and sixty-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

SAMUEL TREAT.

25 MISSOURI DISTRICTS, *sct:*

As clerk of the circuit court of the United States for the districts of Missouri, I herewith transmit a transcript of the record and proceedings in the case as stated in the within writ of error.

In witness whereof I hereunto subscribe my name and affix the seal of said court.

[SEAL.]

BEN. F. HICKMAN,
Clerk of said Court.

26 The United States of America to Robert K. Woods, assignee of the estate and effects of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson, Son & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein Robert Forsyth is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of the judges of the circuit court of the United States for the districts of Missouri, this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

SAMUEL TREAT.

27 Due service of the within acknowledged this 23d day of December, A. D. 1869.

SAM'L S. BOYD,
Att'y for R. K. Woods, Assignee, & Def't in Error.

(Indorsed:) 1869, Dec. term. No. 347. Robert Forsyth, plaintiff in error, vs. Robert K. Woods, assignee, &c., def't in error. Citation & service. Filed 28 December, 1869.

(Indorsement on cover:) No. 347. Robert Forsyth, plaintiff in error, vs. Robert K. Woods, assignee of the estate, &c., of Edward P. Tesson and Edward M. Tesson, composing the firm of Tesson, Son & Co. Missouri C. C. U. S.
Filed 11th December, 1869.

In the Supreme Court of the U. S.

ROBERT FORSYTH,
Plaintiff in error.

vs.

R. K. WOODS, *assignee in bankruptcy of* TESSON, SON & CO.
Defendant.

Dec. Term, 1870.
No. 143.

BRIEF FOR APPELLANT.

This cause comes up by writ of error to the Circuit Court of the United States for the District of Missouri.

The Case.

The plaintiff in error was sued in the District Court by the defendant in error, Woods, assignee in bankruptcy of Tesson, Son & Co., to recover the sum of $5685.76 due the said firm on the 23d day of December, 1867, when they became bankrupt.

The defendant below by plea set off the sum of $6580.65 paid by him on the 6th of May, 1868, under the circumstances stated in his plea; and also the sum of $3869.08 paid by him on the 16th of June, 1868, under circumstances precisely similar.

The questions

involved are two—

1st. Whether upon the facts stated in the plea, the bankrupts were liable for the money so paid.

2d. Whether the debt so accrued as to be set off under the bankrupt laws.

Their liability.

The essential features of the case stated in the plea are as follows:

A partner in the banking house of Tesson, Son & Co. had applied for letters of administration on the estate of one P. A. Sarpy. Before the granting of administration, the said firm had an agreement with their said partner, whereby it was agreed that the firm should take charge of the money and assets of the said deceased, receive the commissions and allowances to which the administrator should be entitled, and should bear all expenses and losses which might be incurred.

And the said firm being thus interested in the emoluments of the office, and, therefore, desiring to obtain the appointment for their said partner, represented these facts to the defendant and requested him to become the surety of their said partner, and at the same time assured him that he would become the surety of the firm which would have the custody of the funds. The defendant moved by their request and representations became the surety of said partner. Administration was granted to him and moneys of the deceased were deposited in the bank of the firm and were there when they became bankrupt, and being so lost, the defendant was obliged to pay one-half the loss, which half amounted to $6580.

Under similar circumstances he became the surety of another partner and lost $3869.08.

FIRST POINT.

The defendant having assumed a liability for, and at the express request of the bankrupts, and the defendant having had to pay money in discharge of this liability, the money so paid was in contemplation of law paid for them and at their request.

The rule on this subject was thus stated by Lord Campbell, C. J., in Battard vs. Hawes, 2 E. & B., 296.

"To support the action for money paid, it is necessary "that there should be a request from the defendant, "either expressed or implied by law. *Where one party "enters into a legal liability for and at the request of another, "a request to pay the money is implied by law from the fact of entering into the engagement.*"

In that case one joint contractor had paid the whole debt, and was suing for contribution; some of the other joint contractors had died, and it became material to inquire *when and how* the liability arose, and in considering that question the Chief Justice stated the general rule.

The rule is stated by Mr. Chitty in his well-known work on contracts, under the head of "money paid," as follows:

"*If money has been paid by the plaintiff in discharge of a liability which he has taken upon himself at the defendant's instance or by his authority, the laws will imply that it was paid at his request.*"

Chitty Con., 10 Ed., p. 660.

And to this rule he refers all the cases of implied contracts to indemnify sureties, agents, and accommodation acceptors, as well as a great number of anomalous cases, in which plaintiffs have incurred liabilities of various kinds at the request of defendants.

The most common class of suits upon implied promises of indemnity is that of sureties against their principals and accommodation acceptors, in which the usual and proper form of action is for money paid for and at the request of the defendant; and in most of such cases the plaintiffs have paid money which the defendant was bound to pay, but the liability of the defendant is not a necessary fact in the case.

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This point is thoroughly discussed in the case of Brittain v. Lloyd, 14 M & W., 762.

In that case the defendant employed an auctioneer to sell land, and at the sale bid it in, and forthwith sold it to the next highest bidder. It appears from the argument that the auctioneer who sells land, and he alone, is liable for the auction duty; and that when land is bid in, no duty is payable. However, under the circumstance, the excise commissioner exacted the tax, which the auctioneer paid and then sued the seller.

Judgment delivered by Justice Pollock. "It was argued by Mr. Humfrey that this form of action could not be maintained, unless the effect of the payment was to relieve the defendant from some liability for the amount to which the party to whom payment was made, and that otherwise it could *not* be paid for the defendant's use; and he relied on the case of Spencer v. Parry, (3 East., 337,) as an authority for that proposition, and contended that as the defendant in this case was not made liable to the crown by the act of Parliament, the money was paid to one who had no claim upon her, and therefore not to her case.

"The proposition, however, is not warranted by the decision of Spencer v. Parry, though some expressions in the report of the judgment, give a countenance to the argument of the learned counsel, nor can the proposition be maintained; for it is clear that if one requests another to pay money for him to a stranger with an express or implied undertaking to repay it, the amount when paid is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid, and it is wholly immaterial whether the money is paid in discharge of a debt due to the stanger, or as a loan or gift to him; on which two latter supposi-

tions the defendant is relieved from no liability by the payment. The request to pay and the payment according to it constitute the debt, and whether the request to direct as where the party is expressly desired by the defendant to pay, or indirect where he is placed by him under a liability to pay, and does pay, makes no difference. If one asks another instead of paying money for him to lend him his acceptance for his accomadation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower by requesting the acceptor to *assume that character which ultimately obliges him to pay, impliedly requests him to pay*, and is as much liable to repay as he would be on a direct request to pay money for him with a promise to repay it. In every case therefore in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied on a promise expressed or implied, to repay the amount this form of action is maintainable."

In Turner v. Davis, 2 Salk., 478; Lord Kenyon held that one who had become surety at the request of another was not liable to at the suit of the latter.

Theobold on Principal and surety, (p. 268,) citing this case says:

"If one also becomes surety at the request of his cosurety, he is not in general liable to the latter for contribution and *consequently it seems that in case the creditor obliges him to pay, he is entitled to complete indemnification from the latter.*"

In Reynolds v. Doyle, 1 M. & G., 753, plaintiff, at defendants request, accepted his draft and had to pay it. Action on special promise, and also on common count

for money paid. Plaintiff proved only the defendant had asked him to lend him his acceptance.

Tindal C. J. "The only real question is what was the contract with which the defendant entered when he asked the plaintiff to lend him his acceptance. The intention to the parties to the contract must be taken to be that the defendant should be considered as the real acceptor of the bill, and should do that which a real acceptor ought to do, that is take up the bill when it became due."

In fact to request one to assume a liability is but another form of requesting him to pay money. It is but requesting him to pay money if a certain contingency happens. He is not asked directly to pay in a certain event, but to promise to pay in a certain event, the forseen and intended and inevitable result of the promise being that he does pay.

The common sense of the matter is that a request to one to promise to do a thing, is a request to him to do it.

Where one overdraws his amount in bank, or draws upon one in whose hands he has no funds, he is liable to an action upon the implied assumpsit only for money paid, yet surely he could not require the plaintiff to show for what the money was paid, whether for a debt, loan or gift. The transfer of the value by the plaintiff is the consideration and a sufficient consideration by well settled rules: the receipt of value by defendant is not necessary.

In this case however, that question does not arise. The plea expressly avering that the liability was incurred by the defendant "upon the joint request of E. P. T., and E. M. T., *and for their use and benefit.*" (Rec., p. 6.)

See also Bailey v. Haines, 13 B., 813, 832.
Batard v, Hawes, 2 E. & B., 296.
Lewis v. Campbell, 8 C. B., 541.

Turner v. Davis, 2 Esp., 478.
Betts v. Gibbins, 2 Ad. El., 57.

And it is the same when the plaintiff accepts a bill of exchange, or makes or indorses a promissory note for the accomodation of the defendant, and without value or consideration, and the plaintiff is obliged to pay the bill or note at maturity, an action lies for money had and received.

Reynolds v. Doyle, 1 M. & G., 753.

SECOND POINT.

The liability of the bankrupt occurs before bankruptcy, viz: at the time when the defendant became surety for the partner.

On this point the case of Batard v. Hawes, is expressed.

That of Appleton vs. Bascom, 3 Met., 170, is equally so. That case was thus stated and decided.

Wilde, J.—"This is an action of debt on a bond given for the liberty of the prison limits, and the question is, whether the principal in the bond after the giving of said bond, committed an escape by going without the prison limits. And this depends on ascertaining the time when the contract was made, on which the judgment was recovered upon which the execution issued, by virtue of which the said principal in the bond was committed to prison. The said judgment was recovered in an action for money paid by the plaintiffs, and which they are obliged to pay for said principal, by reason of his breach of the condition of an administration bond, which they had executed as his sureties.

"The action was founded on an implied promise; and the question is reduced to this whether, the promise was implied by law at the time when the plaintiffs became sureties, or not until they paid the money, when their right of action against the defendant first accrued. And

we think it is well settled, that when a surety becomes bound for his principal, and at his request the law implies a promise of indemnity by the principal to the surety to repay the latter all the money he may be compelled to pay the creditor in consequence of his assumed liability. So the law is laid down in Wood v. Leland, 1 Met., 389; and so it was decided in Gibbs v. Bryant, 1 Pick., 121; in Toussaint v. Martinnant, 2 T. R., 104; in Howe v. Ward, 4 Greenl., 200; and in many other cases. * * * * *

"And the implied promise of indemnity in the present case must be considered as made at the time when the plaintiffs became responsible to the creditor on the bond. The plaintiffs' was the consideration, the principal's implied promise of indemnity, and the promise must be considered as made at the time when that liability was assumed. And the plaintiffs when they paid the money, might have declared on said implied promise, or for money paid in common form, as the declaration was."

THRID POINT.

Whether the payment so made by the defendant below can be set off in this action.

The right in any action of indebitatus assumpsit to set off "money paid" being plain, the question here is only as to the effect of the bankrupt act upon the case.

The provisions of that act, applicable to the case, are two only—

The 20th section of the act restricts the right of set off to demands "*in their nature*" provable under the act.

This being a demand for "money paid" is provable under the general description of a "debt," and is moreover expressly made provable by the 19th section of the act, which provides, that if payment be made after bank-

ruptcy by reason of any contingent liability existing at the time of the bankrupteys, such payment may be proved at any time before final dividend.

Remarks.

We have no indications in the record or elsewhere of the grounds on which the Circuit Court sustained the demurrer. Assuming that the brief filed in this Court by the defendant in error, states the view of the case taken by the Circuit Court, we submit that the Court entirely misapprehended the case.

I. The plea was considered as making a case of an attempt to set off debts due the defendant in error by the partners individually.

This is not the case. Each one of the demands set up in the plea is for money paid at the *joint request* of the two and only members composing the firm, "and for their *joint* use and benefit"—and it is further shown, that the emoluments were to go to the firm as "a matter of partnership business."

II. It is argued that the only ground of considering the liability joint, is the accidental circumstance of the two principals on the bond being partners.

That is not our case, their joint liability depends on the fact that the *request* was *joint*, and the act done was for "their joint use and benefit."

III. The case is considered as resting on a promise by the firm to be responsible for the trust funds coming into the principal's hands.

There was indeed such an implied promise, but our case does not rest on that promise, but on the implied request to pay when the money became due, which request was implied from all the preceding facts.

We submit this is not undertaking to answer for the default of another, nor any undertaking to answer for

any default, but a contract directly between the plaintiff and defendant, a request from one directly to the other to pay money, and the payment of money in pursuance of that request. The statute of frauds has no application to such a case.

IV. It is said the bankrupt act, section 19, only allows to be proved, debts due at the time of bankruptcy.

But a subsequent part of the same section provides for proving "contingent debts," and "contingent liabilities."

V. It is said that the bankrupt act excludes claims not in its nature provable against the estate.

But we submit we have shown that this claim is so provable.

Conclusion.

We submit that the judgment of the Circuit Court should be reversed.

T. T. GANTT,
J. M. CARLISLE,
J. D. McPHERSON,
For Plaintiff in error.

U. S. Supreme Court.

December T., 1870.

FORSYTH, *P. E.*,

vs.

WOODS, *D. E.*

BRIEF of S. S. BOYD,

For D. E.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ROBT. FORSYTH, *P. E.*,
vs.
ROBT. K. WOODS, ASSIGNEE, &c., *D. E.*

In Error to the U. S. Circuit Court. Districts of Missouri.

Brief of S. S. Boyd, for Defendant in Error.

STATEMENT OF THE CASE.

This was an ordinary action of assumpsit brought in the U. S. District Court for the Eastern District of Missouri, by R. K. Woods, as Assignee in Bankruptcy of E. P. and E. M. Tesson—composing the firm of Tesson, Son & Co.—against Robert Forsyth, to recover of him the sum of five thousand six hundred and eighty-five $\frac{76}{100}$ dollars, balance of account due, and also the balance unpaid on a certain note of hand for three hundred dollars, as set forth in the declaration. To this the defendant put in a special plea in bar, in substance as follows, to wit:

That from the 27th July, 1865, up to the 23d December, 1867 (the date of adjudication in bankruptcy), the firm of Tesson, Son & Co. was composed solely of Edward *P.* and Edward *M.* Tesson. That on the first mentioned date E. *P.* Tesson was appointed administrator

with the will annexed of Peter A. Sarpy, by the Probate Court of St. Louis county, Missouri. That as such administrator he was required to give bond with two sureties in the penal sum of $100,000. *"And the said E. P. Tesson and the said E. M. Tesson did then and there * * * request the said defendant to become one of such sureties of the said E. P. Tesson, and did assure him, the said defendant, that all the money and assets which were of the said Sarpy would pass into the possession, custody, care and control of the said E. P. Tesson & Co.; and that although nominally the said E. P. Tesson was the only person named as principal in the said bond, yet in fact it was the purpose and design of the said E. P. Tesson & Co. to make the business of the said administration a matter of partnership business, and to make the said partnership share in the profit and losses thence arising, so that in effect he, the said Forsyth, by signing the said bond, would become the surety of the said firm of E. P. Tesson & Co., and not merely of the said E. P. Tesson. And the said Forsyth, moved by the said joint request * * * * did become surety of E. P. Tesson in said bond, * * * * and the said E. P. Tesson and E. M. Tesson did immediately thereupon take possession of all the goods and chattels * * * * that were of the said Sarpy, and had and held them in the possession of them the said E. P. Tesson & Co., in all respects and particulars as the said E. P. and E. M. Tesson as aforesaid assured the said Forsyth that it was their purpose to do; * * * * and on the 23d December, 1867, when the said firm of E. P. Tesson & Co. became and was bankrupt, there was in the hands of the said firm, belonging to the estate of the said Sarpy, $13,161.31, for the safe keeping of which by the said firm, and for the true payment thereof according to the orders of the St. Louis Probate Court, the defendant had become bound as aforesaid. And on the 6th day of May, 1868, the said E. P. Tesson was ordered by the St.*

Louis Probate Court to pay the said sum of money to the legal representatives and next of kin of the said Sarpy, and neither the said E. P. Tesson nor the said E. P. Tesson & Co. could or would pay the same; whereupon the said defendant, in compliance with his contract in that behalf, did on the said 6th day of May, 1868, pay to the said distributees, and next of kin of the said Sarpy, the sum of $6,580.65, *being the one half of the said defalcation of the said E. P. Tesson & Co.*"

That on the 22d March, 1866, E. *M.* Tesson, the other member of the firm, was appointed by the same court curator of one Damaso Gazzi, a person of unsound mind; that he was required to give bond with two sureties in the penal sum of $15,000, * * and that the defendant Forsyth became one of such sureties. It alleges the same joint request, and the same promises in regard to the use and disposition of the funds that should come into the hands of such curator, E. *M.* Tesson, as are set forth in the abstract from the plea above recited in regard to the administration of E. *P.* Tesson upon the Sarpy estate Avers that when said firm became bankrupt there was in its hands $3,869.08 belonging to said Gazzi; that Gazzi died in 1868, and his administrator on 1st June, 1868, demanded of said E. *M.* Tesson said balance, which said E. *M.* Tesson was unable to pay and did not pay; that defendant on 16th June, 1868, paid said sum to said administrator.

"*And defendant says that the liability by which he became liable as aforesaid to pay the said sums of money was incurred by him in each case upon the joint request of the said E. P. and E. M. Tesson, and for their joint use and benefit; and the said defendant says that the said sums of money so by him paid as aforesaid amount to the sum of* $10,449.73, *and the amount thereof greatly exceeds the sum of money by him owing to the said firm of E. P. Tesson & Co., as in said plaintiff's declaration stated and set forth;*

and out of the money so by defendant paid, to wit, the sum of $10,449.73, *for the use of the said E. P. and E. M. Tesson, and at their request, the defendant is ready and offers to allow the sum in the plaintiff's declaration mentioned, and for the balance he craves judgment against the said plaintiff as assignee of the said E. P. Tesson & Co.*"

To this the plaintiff put in a general demurrer, which upon argument was sustained, and, the defendant electing to stand by his plea, final judgment was given on the demurrer thereto; from which the defendant took his writ of error to the Circuit Court of the U. S. for the Districts of Missouri, whence, the judgment of the District Court being affirmed, the defendant brings the case here by writ of error.

POINTS.

I. The issue presented, we submit, is simply this: — The assignee of a bankrupt firm, composed of two members, brings suit against a debtor to said firm for money due said members in their partnership capacity. The defendant admits the claim, but seeks to offset it by certain debts due him from the partners individually, aggregating more than his liability to the partnership, and asks that judgment may be given him against the partners jointly for the amount of such excess. In other words, the separate creditor asks payment from the partnership assets before the joint creditors of the partners have been paid in full. This the *Bankrupt Act of March 2d, 1867*, (§ *36, G. C. 146*), forbids in these words: "*The net proceeds of the joint stock shall be appropriated to pay the creditors of the partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors.*" And in no case can the joint stock go to pay the separate creditors save when there is a balance of the joint stock after payment of the joint debtors. (*Idem.*)

If, then, the facts appearing upon the record show, as we claim they clearly do, that the defendant, *Forsyth*, is not a creditor of the partnership, but merely a separate creditor of each of the members thereof, and does not show that all the partnership creditors have been paid, leaving a balance to be distributed among the separate creditors of each, the plea of defendant is fatally defective in omitting this material and vital allegation of excess of partnership assets.

II. What kind of a creditor does the record show *Forsyth* to be?

From the record it clearly appears that *Forsyth* became at different times, and in different amounts, and under different circumstances, surety for each of the *Tessons* individually, in the usual manner, by executing a bond for the faithful discharge, &c., by each of them separately, of their several duties imposed upon each by their separate and entirely distinct trusts. It clearly in terms shows that E. *P.* Tesson was not in any sense a party, either as principal or surety, to the bond given for E. *M.* Tesson; and equally clearly that, on the other hand, E. *M.* Tesson was in nowise such to the bond given for E. *P.* Tesson, by reason of the breaches of which by them severally the claim of defendant arises.

In order to simplify the matter we will take the case of the E. *P.* Tesson bond by itself, as the facts in relation to both bonds, so far as they affect the question at issue, are identical; and whether *Forsyth* was surety for each of the partners separately, or for only one of them, is of no importance.

So far as E. *P.* Tesson is concerned, he is individually liable as principal in the bond given by *Forsyth* as surety. If E. *M.* Tesson has incurred any liability at all, it can only be on one or the other of two grounds very different from that which fixes the liability of E. *P.* Tesson. It must be either on his implied promise that

due, but it had no existence *at the time of the adjudication* of bankruptcy, to wit, on the 23d day of December, 1867, for the liability of *Forsyth* did not become absolute till the 6th day of May, 1868, when E. *P.* Tesson made default.

The only exception to this rule is found in same section above cited (*G. C. 91*), and is as follows: "*Any person liable as bail, surety, * * * * for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt * * * * although such payment shall have been made after the proceedings in bankruptcy were commenced.*"

The defendant clearly does not come within this saving clause allowing proof to be made, although the liability did not attach till after the date of adjudication, for he was in nowise the guarantor or surety of the partners, but only of one of them.

V. The defendant in his plea seeks to *offset* the debt due from him to the partnership by the several debts of the individual partners due him. Now the Bankrupt Act of 1867 (§ *20*, *G. C. 95*) provides specifically for this matter of set-off, and declares that "no set-off shall be allowed of a claim in its nature *not provable against the estate*." But we have shown above that the claim of defendant is "*not provable against the estate*" of the partnership, because not due or existing *at the time of the adjudication* and not a claim of a surety of the firm, and hence it cannot be made a matter of set-off.

We submit, then, that the defendant has no right to receive from the joint assets the amount of his claims against the individual members of the firm, but must resort to the separate estate of each partner through whose default he has suffered, leaving their joint estate for the payment of the joint creditors.

SAM'L S. BOYD,
Attorney for D. E.

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